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Office of the Secretary
Federal Communications Commission
1919 M Street, NW
Washington, DC 20554

Re: In the Matter of Implementation of Section 207 of the Telecommunications Act of 1996, Restriction on Over-the-Air Reception Devices: Television Broadcast Service and MMDS (CS Docket No. 96-83); Preemption of Local Zoning Regulation of Satellite Earth Stations (IB Docket No. 95-59)

Dear Commissioners:

Our firm has been involved with the representation of community associations for over 25 years and has represented countless associations across the country. As a firm which practices in the field of real estate law, with an emphasis on community association matters, we are troubled by the application of the above rule in a manner which prevents reasonable, private restrictions or regulations, and the potential application of the rule to areas of common property owned by community associations, as alluded to Commissioner Chong's Separate Statement.

Enclosed are our comments.

Sincerely,

Wayne S. Hyatt /cc

Wayne S. Hyatt

In the Matter of	)	
	)	
Preemption of Local Zoning Regulation of Satellite Earth Stations	)	IB Docket No. 95-59
	)	
In the Matter of	)	
	)	
Implementation of Section 207 of the Telecommunications Act of 1996	)	CS Docket No. 96-83
	)	
Restrictions on Over-the-Air Reception Devices: Television Broadcast Service and Multichannel Multipoint Distribution Service)	)	

Section 207 of the Telecommunications Act of 1996 gives the Federal Communications Commission ("FCC") the directive of ensuring that a viewer's right to receive video programming is not impaired. The resulting regulations adopted by the Commission on August 5, 1996, do an admirable job of accomplishing this directive as it can be applied in situations where the viewer has *exclusive* control over the property upon which he or she desires to place antennas and satellite dishes. However, it should be made clear that where the property owner does not have such exclusive control, as when the property in question is common area owned by a community association or owners in common the same rights should not be afforded.

Aside from the obvious negative aesthetics and decline in property values in communities which have antennas coming out of every roof and window, there are practical and legal issues involved in the taking of common property by individual owners. If individual owners are allowed, at their discretion, to install antennas and satellite dishes on common property such as a roof, what will happen when that roof space or other appropriate areas run out of space? What methods will be used to decide which owners' antennas stay up and which ones come down? As it would be difficult to assess which owners cause damage to the common property by the installation and maintenance of their antennas, such expense would be a common expense charged to all owners whether or not the owner has an antenna on the common property.

If these practical issues were not enough to cause discord among unit owners and within the community association, allowing individuals an exclusive use of a portion of the common creates legal questions of property rights. In communities where the common property is owned by the association or by the owners in common, each owner in the development is entitled to an easement of use and enjoyment or an undivided percentage interest in the common areas. Use and enjoyment of the common areas of a development is often one of its most marketable assets. The idea that any one owner can make alterations or additions to the common area without any authority or permission from the owner of that property, namely the association or all unit owners in the community, contradicts the purpose of that *common* area and infringes on the other owners' right to the use and enjoyment of that property.

In *Makeever v. Lyle* (CA-CIV 4111, Arizona Court of Appeals, March 4, 1980), the court held that a portion of the common elements could not be delegated to a single owner's use

without the unanimous consent of all other owners and that such action constituted a taking of the other remaining individual owners' property. Many communities have provisions in their governing documents that control how common area can be used by the association and its members which generally call for consent of the members. In *Enright v. Sea Towers Owners Association, Inc.* (370 So.2d 28 Fla. Dist. Ct. of App., 1979), although the declaration called for owner consent, the association constructed a building on common property without their consent. The court held that the declaration should prevail. To require associations to allow individual owners to install antennas on the common property would, in virtually all cases, contradict the community's governing documents and usurp the authority of the association over its property. The business judgment rule used in cases across the country acknowledges an association's right to carry out its authority and prohibits "judicial inquiry into actions of corporation directors taken in good faith and in the exercise of honest judgment in the lawful and legitimate furtherance of corporate purposes" (*Levandusky v. One Fifth Avenue Apartment Corp.*, 544 N.Y.S.2d 805, 75 N.Y.2d 530, N.E. 2d 1317, 1990). Applying the proposed rule would negate the association's judgment in overseeing the common property.

The implications of applying this rule to common property would constitute a taking under *Loretto v. Teleprompter Manhattan CATV Corp.* (458 U.S. 419,426,102 S. Ct. 3164,3171,73 L.Ed.2d 868, 1982). In this case, the Supreme Court ruled that a "New York law requiring landlords to allow cable television facilities on property was a 'taking' of property compensable under Fifth and Fourteenth Amendments." *Id.*

"Within the bounds of fair interpretation, statutes will be construed to defeat administrative orders that raise substantial constitutional questions." *Bell Atlantic Telephone Companies v. F.C.C.*, 24 F.3d 1441, 1445 (D.C. Cir. 1994). Citing *Loretto,* the court held that the FCC's rule granting competitive access providers the right to exclusive use of a portion of the local telephone exchange companies' central offices implicates the Just Compensation Clause of the Fifth Amendment, under which a "permanent physical occupation authorized by government is a taking without regard to the public interests that it might serve." *Id.*

Similarly, if the FCC were to require an association to allow individual unit owners to install antennas or satellite receivers on the common property, the FCC would be authorizing a permanent physical occupation of the common property. Such a policy would implicate the Just Compensation Clause. The clause only prohibits *uncompensated* takings. *Id.* However, in the instant matter, there is no fair, tangible way to assess the value of the common area lost by an association if the FCC were to authorize such a taking. Common areas are a major amenity of an association. Many unit owners purchase property located in a development with a community association because of the benefits and lifestyle provided by the common areas. Common areas are a defining feature of community which cannot be separated from the association. To take any part of the common area from the common owners and give it to an individual for the individual's use in installing an antenna strips the community association of an asset that cannot accurately be appraised.

We are strongly opposed to any rule that would allow the individual unit owner the right to take a portion of the common area for his or her exclusive use. Our opposition is particularly intense in situations in which access to video programming can be accommodated for the community by the association. We support the Community Association Institute's suggestion that

if a community association installs a central antenna or otherwise makes video programming services available to residents who want them, the association could prohibit the installation of individual antennas.

We suggest that if an association provides such technology to its members, the association should be allowed to prohibit the installation of antennas not only on the common property, but on an individual owner's property, as well. The association, or the unit owners as common property owners, would have the capability to preserve aesthetic interests, while protecting the viewer's right to video programming. Congress' intent in enacting the Act was to "make available so far as possible...a rapid, efficient, nation-wide, and world-wide wire and radio communication service with adequate facilities at reasonable charges." A community association which imposes restrictions on the installation of antennas by unit owners but installs, and makes available for use of unit owners, a central antenna designed to receive direct broadcast satellite service and video programming services via multipoint distribution services would be within the bounds of the FCC's intent and should be protected by the FCC's rule.

So long as antennas installed by an association provide access, at a reasonable cost, to substantially the same services as would private antennas, restrictions on private antennas would not unreasonably prevent or unreasonably increase the cost of receiving those services. Adoption of such a policy would foster, rather than circumvent, Congress's goal.

Our experience as counsel to numerous community associations and developers of master planned communities indicates that people purchase homes governed by community associations because of the services and amenities that such associations provide. These services and amenities are generally far more comprehensive than those an individual owner could afford to build and support himself. A purchaser may give up the right to build a pool or a tennis court in his back yard in order to live in a community which provides far more elaborate neighborhood facilities maintained by the association. Owners are willing to give up some measure of control for this basket of services that frees the owner from maintenance obligations. This system protects the rights of each owner within the community. Such a scenario parallels that of the association's provision of video programming services.

In summary, we are vehemently opposed to any rule which would require an association to allow individual owners to install antennas upon common property. Furthermore, we support a rule allowing an association to prohibit installation of an antenna on a member's property, if the association makes available to the members, at a reasonable cost, substantially the same services as those available from a private antenna.